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CPLR 315: Indigent Has Constitutional Right to Free Publication in Divorce Action

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CPLR 302(a)(2): Personal jurisdiction secured over nondomiciliary who through an agent committed a tort in New York.

CPLR 302(a)(2) authorizes the exercise of personal jurisdiction over a nondomiciliary who commits a tortious act (except defamation) within New York either in person or by an agent.⁵¹ *Neilson v. Sal Martorano, Inc.*⁵² is a healthy example of the successful invocation of this provision against a nondomiciliary who through an agent commits a tort within this state.

In *Neilson*, plaintiff sought to recover from defendant Perez moneys allegedly paid to her by the defendant corporation to satisfy certain mortgages. Plaintiff alleged that no consideration for said mortgages was provided by the former defendant. Defendant Perez moved to dismiss the complaint against her for want of personal jurisdiction, but the supreme court denied her motion. On appeal the appellate division affirmed, for there were facts tending to prove that defendant Perez participated in fraudulent conveyances within this state through agents.⁵³ "A trier of the facts," the court concluded, "could find that the defendant Perez conspired with her brother to effect fraudulent conveyances, that he acted as her agent in preparing and recording the mortgages and in the payment to her in satisfaction of the mortgages, and that those acts therefore constituted tortious acts in New York."⁵⁴

CPLR 315: Indigent has constitutional right to free publication in divorce action.

The right of indigents to maintain marital actions regardless of their inability to pay court fees and costs has been established.⁵⁵ This does not, however, break all financial barriers confronting an indigent

cases. . . . may well be tempted by the expectation that the same rule will be reciprocally applied . . ." *A. Millner Co. v. Noudar*, LDA, 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 294 (1st Dep't 1966).

Limitations were inserted deliberately into CPLR 302 to keep said provision "well within constitutional bounds." TWELFTH REP. 341.

⁵¹ See 1 WK&M ¶ 302.10.

⁵² 36 App. Div. 2d 625, 319 N.Y.S.2d 480 (2d Dep't 1971).

⁵³ *Id.*, 319 N.Y.S.2d at 481.

⁵⁴ *Id.* at 626, 319 N.Y.S.2d at 482.

⁵⁵ *Boddie v. Connecticut*, 401 U.S. 371 (1971). Justice Harlan, speaking for the Court, stated:

Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit the state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

Boddie recognized an alternative to publication, i.e., "service at defendant's known address by mail and posted service . . ." *Id.* at 382. See also Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968).

in a marital action, for the cost of the requirement of service by publication as a condition to the action⁵⁶ may in fact bar an indigent from obtaining judicial relief. Service by publication, under CPLR 315,⁵⁷ is the required alternative to personal service in actions for divorce based on abandonment⁵⁸ and in actions for dissolution of marriage.⁵⁹ This conforms with the state constitution's mandate that divorces may be granted only in "due judicial proceedings."⁶⁰

To guarantee the rights of indigents to due process and equal protection⁶¹ in marital actions, the burden of the required publication expenses is being transferred to the public. *Dorsey v. City of New York*⁶² follows *Jeffreys v. Jeffreys*⁶³ in effecting this shift. Both decisions maintained that access to the courts in marital actions may not be blocked by monetary obstacles, for divorce and dissolution are available only through the courts.⁶⁴ To enable an indigent to exercise her constitutional right of access to the court, the Supreme Court, New York County, in *Dorsey*, like the Supreme Court, Kings County, in *Jeffreys*, directed the City of New York to pay the cost of publication.⁶⁵

CPLR 104 directs that New York's *in forma pauperis* statutes⁶⁶ "shall be liberally construed to secure the just, speedy and inexpensive determination of every judicial proceeding." Whether in this light the court concludes that there is⁶⁷ or is not⁶⁸ statutory authorization for public payment of publication expenses, however, it is clear that the

⁵⁶ DRL 232 provides that in a marital action defendant may be served personally or by publication. *Root v. Root*, 43 Misc. 2d 337, 250 N.Y.S.2d 933 (Sup. Ct. Westchester County 1964), held that failure of the section to allude to any other method means that substituted service is not available.

⁵⁷ CPLR 315 provides:

The court, upon motion without notice, shall order service of a summons by publication in an action described in section 314 if service cannot be made by another prescribed method with due diligence.

See 1 WK&M ¶ 315.01.

⁵⁸ DRL 170(2).

⁵⁹ DRL 221.

⁶⁰ N.Y. CONST. art. I, § 9.

⁶¹ U.S. CONST. amend. XIV; N.Y. CONST. art. I, § 11.

⁶² 66 Misc. 2d 464, 321 N.Y.S.2d 129 (Sup. Ct. N.Y. County 1971).

⁶³ 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968); see 7B MCKINNEY'S CPLR 102, supp. commentary at 110 (1969); McLaughlin, *New York Practice*, 21 SYRACUSE L. REV. 709, 729 (1969); 37 FORDHAM L. REV. 661 (1969); *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 139 (1969).

⁶⁴ These actions are distinguishable from other civil disputes, which may be resolved without the aid of courts.

⁶⁵ 66 Misc. 2d at 466, 321 N.Y.S.2d at 131.

⁶⁶ CPLR 1101, 1102.

⁶⁷ *Brown v. Wyman*, 59 Misc. 2d 740, 300 N.Y.S.2d 254, 258 (Sup. Ct. Onondaga County 1969) determined that CPLR article II sanctions an order directing the county to fix costs of publication for a litigant declared to be a poor person.

⁶⁸ *Jeffreys v. Jeffreys*, 58 Misc. 2d 1045, 1050-51, 296 N.Y.S.2d 74, 81 (Sup. Ct. Kings County 1968).

constitutional mandates of due process and equal protection necessitate such. Relying upon these constitutional guarantees, *Dorsey* has harmonized the due process requirements of notice and free access to the courts.

ARTICLE 23 — SUBPOENAS, OATHS AND AFFIRMATIONS

CPLR 2302, 2307: Latter section operates only in conjunction with former section.

The issuance of subpoenas is governed generally by article 23 of the CPLR and specifically by various other statutes. CPLR 2302 authorizes issuance in general,⁶⁹ and CPLR 2307 provides that a subpoena duces tecum to be served upon a library or upon an agency or officer of the state or of a municipal corporation must be issued by a justice of the supreme court.⁷⁰ Understandably, the issue arose whether CPLR 2307 restricts the power to issue subpoenas granted to various administrative agencies in their enabling statutes.

This question has been answered by the Court of Appeals in *In re Irwin v. Board of Regents*.⁷¹ Petitioner Irwin, a certified public accountant, was convicted under federal law of furnishing a gratuity to a federal employee. The State Department of Education then charged him with conviction of a crime⁷² and unprofessional conduct.⁷³ After a hearing, a subcommittee of said department found him guilty of both charges. Ultimately, the Commissioner of Education revoked petitioner's license to practice as a certified public accountant.⁷⁴ Petitioner then brought a proceeding to reverse the order of revocation, contending that he had been denied a fair hearing because, *inter alia*, the subcommittee denied his request for the issuance of certain subpoena duces tecum.⁷⁵ The Supreme Court, Special Term, reversed the order⁷⁶ but was in turn reversed by the Appellate Division, Third Department.⁷⁷ The Court of Appeals affirmed, reasoning that the refusal to issue subpoenas duces tecum to several state officials was not an abuse of discretion because their issuance could not have strength-

⁶⁹ See 7B MCKINNEY'S CPLR 2302, supp. commentary at 28 (1965); 2A WK&M ¶ 2302.09 (1969).

⁷⁰ See 2A WK&M ¶ 2307.04 (1969).

⁷¹ 27 N.Y.2d 292, 265 N.E.2d 752, 317 N.Y.S.2d 332 (1970).

⁷² N.Y. EDUC. LAW § 7406(i)(c) (McKinney 1953).

⁷³ *Id.* § 7406(i)(b).

⁷⁴ 27 N.Y.2d at 295, 265 N.E.2d at 753, 317 N.Y.S.2d at 334.

⁷⁵ *Id.* at 295, 265 N.E.2d at 753, 317 N.Y.S.2d at 334-35.

⁷⁶ 53 Misc. 2d 430, 279 N.Y.S.2d 69 (Sup. Ct. Albany County 1967).

⁷⁷ 33 App. Div. 2d 581, 304 N.Y.S.2d 319 (3d Dep't 1969).